

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
 :
 v. : CIVIL NO. 06-33
 :
 :
 DAVID CUTHBERT : CRIMINAL NO. 02-405-5

SURRICK, J.

JANUARY 31, 2006

MEMORANDUM & ORDER

Presently before the Court is Defendant David Cuthbert's pro se Petition For Writ Of Habeas Corpus under 28 U.S.C. § 2241 (Doc. No. 1). For the following reasons, the Petition will be denied.

On November 19, 2002, Petitioner David Cuthbert, Ronald Pierce, Nakiea Darden, Eric Roach, and David Thomas were indicted in this District for conspiracy to commit interstate transportation of stolen goods in violation of 18 U.S.C. § 371, and interstate transportation of stolen goods in violation of 18 U.S.C. § 2314. On July 25, 2003, Petitioner entered a plea of guilty pursuant to a written Guilty Plea Agreement. On October 20, 2003 Petitioner was sentenced to a period of incarceration of forty-one (41) months to be followed by a period of supervised release of three (3) years. No fine was imposed but Petitioner was directed to make restitution.

On May 18, 2002, Petitioner was arrested in Nevada for burglary and related offenses arising from the incident that gave rise to the federal conspiracy and interstate transportation charges. Petitioner remained in detention in Nevada until December 7, 2002, when he was taken into federal custody on a Writ of Habeas Corpus Ad Prosequendum in order to face the federal charges. On November 18, 2003, after sentencing here, Petitioner was returned to Nevada to

face the state charges. On December 3, 2003, Petitioner received a sentence from the state court of sixty (60) months incarceration. On June 14, 2004, Petitioner was paroled from his state sentence and was taken into federal custody to serve the forty-one month sentence imposed by this Court.

Petitioner filed the instant Petition under 28 U.S.C. § 2241 in the District Court for the District of New Jersey.¹ On January 3, 2006, the Honorable Freda L. Wolfson of that court transferred the matter to this Court. Judge Wolfson concluded that Petitioner's claim that the sentence imposed by this Court which was designated to run consecutively to the sentence not yet imposed in Nevada was properly a claim under 28 U.S.C. § 2255 and should therefore be dealt with by the sentencing court.²

¹ Unless otherwise specified, all docket numbers refers to Civil Action No. 05-3830 in the District Court for the District Court of New Jersey.

² Section 2255 provides, in pertinent part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255.

Petitioner challenges the terms of his forty-one month sentence imposed by this Court.³ We agree with Judge Wolfson that Petitioner’s claim regarding this sentence is properly categorized as a claim under § 2255 and should be handled by this Court. *See Okereke v. United States*, 307 F.3d 117, 120 (3d Cir. 2002) (“Motions pursuant to 28 U.S.C. § 2255 are the presumptive means by which federal prisoners can challenge their convictions or sentences that are allegedly in violation of the Constitution.”); *United States v. Walker*, 980 F. Supp. 144, 145-46 (E.D. Pa. 1997) (“[A] challenge to the sentence as imposed must be made under 28 U.S.C. § 2255.”)

On October 20, 2003, when we imposed the forty-one month sentence we specifically directed that the sentence “shall be served consecutively to any sentence imposed in Nevada” We knew at that time that Nevada had not yet sentenced Petitioner. (Sentencing Hr’g Tr. at 23; J., Doc. No. 109, E.D. Pa. Crim. No. 02-405-03.) On December 2, 2003, Petitioner was sentenced in Nevada state court to sixty months imprisonment on the burglary charges. (Jan. 3, 2006 Order, Doc. No. 5 at 2.)

Petitioner argues that 18 U.S.C. § 3584(a) does not permit a federal district court to order that a federal sentence run consecutively to a state sentence when the state sentence has not yet been imposed.⁴ (Doc. No. 1 at 3.) The Third Circuit has not directly addressed this issue, *see*

³ Petitioner also claimed that he was entitled to credit on his federal sentence for time served between December 7, 2002 and June 14, 2004. Judge Wolfson determined that the Attorney General was responsible for computing sentences, that computation of sentences was governed by 18 U.S.C. § 3585, that Petitioner had already received credit for this time on his state sentence, and that Petitioner was not entitled to credit for this time on his federal sentence.

⁴ Section 3584(a) provides, in pertinent part:

Imposition of concurrent or consecutive terms. If multiple terms of imprisonment

United States v. Randolph, 80 Fed. App'x 190, 193 (3d Cir. 2003), and there is a split of authority among the other circuits on the issue. However, a majority of the circuits have concluded that a district court may order that a federal sentence shall run consecutively to a yet-to-be imposed state sentence. See *United States v. Mayotte*, 249 F.3d 797, 799 (8th Cir. 2001) (district court has authority to order defendant to serve such sentences consecutively); *United States v. Hernandez*, 234 F.3d 252, (5th Cir. 2000) (same); *United States v. Williams*, 46 F.3d 57, 58-59 (10th Cir. 1995) (same); *United States v. Ballard*, 6 F.3d 1502, 1507 (11th Cir. 1993) (same). But see *Romadine v. United States*, 206 F.3d 731, 737-39 (7th Cir. 2000) (district court may not require such a sentence to run consecutively); *United States v. Quintero*, 157 F.3d 1038, 1039-41 (6th Cir. 1998) (same); *United States v. Clayton*, 927 F.2d 491, 492-93 (9th Cir. 1991) (same).

We find the majority view more persuasive. The language of § 3584(a) supports the sentence imposed by this Court. Although the statute does not “directly address whether the district court may impose a federal sentence to be served consecutively to a yet-to-be-imposed state sentence. . . . [it] certainly do[es] not prohibit it” *Mayotte*, 249 F.3d at 799; see also *United States v. Brown*, 920 F.2d 1212, 1217 (5th Cir. 1991) (the sentencing provisions “indicate

are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

18 U.S.C. § 3584(a).

that the discretion exercised by the district court when determining whether to impose concurrent or consecutive sentences may consider subsequent sentences anticipated, but not yet imposed, in separate state court proceedings.”). Moreover, the language of the statute encourages consecutive sentences. *Mayotte*, 249 F.3d at 799. The statute specifically provides: “Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.” 28 U.S.C. § 3584(a). In this case, if we had failed to make any statement at the time of sentencing or in the judgement of sentence, the sentence of this Court would still have run consecutively to the state sentence as required by § 3584(a). Clearly, the language of § 3584(a) does not prohibit the sentence which we imposed on October 20, 2003.

An appropriate Order follows.

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	:	
DAVID CUTHBERT	:	CRIMINAL NO. 02-405-5

ORDER

AND NOW, this 31st day of January, 2006, upon consideration of David Cuthbert's pro se Petition For Writ Of Habeas Corpus under 28 U.S.C. § 2241 (Doc. No. 1), it is ORDERED that the Petition is DENIED.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge